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No. 09-1447

Supreme Court, U.S.
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In The

Supreme Court Of The United States

MILLER AUTO SALES, INC.,
a Virginia corporation,

Petitioner,

v.

VOLKSWAGEN OF AMERICA, INC.,
a New Jersey corporation,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The Commonwealth Of Virginia

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the Supreme Court of Virginia correctly held that Va. Code § 46.2-1569(7), as applied by the Commissioner of Motor Vehicles of the Commonwealth of Virginia with respect to the shipment of certain vehicles by Volkswagen of America, Inc., a motor vehicle distributor, to Miller Auto Sales, Inc., a Virginia motor vehicle dealer, between October 1997 and April 1997 violated the Due Process Clause of the U.S. Constitution because the statute failed to give fair warning to VWoA of what conduct the statute prohibited.

CORPORATE DISCLOSURE STATEMENT

Respondent Volkswagen of America, Inc. is an operating unit of Volkswagen Group of America, Inc., a New Jersey corporation. Volkswagen Group of America, Inc. is wholly owned by its parent company, Volkswagen AG, a German corporation.

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STATEMENT OF THE CASE

I. THE PARTIES.

Volkswagen of America, Inc. ("VWoA") is a New Jersey corporation, with its headquarters in Herndon, Virginia.[1] VWoA is a motor vehicle importer and distributor. Each year, VWoA imports into the U.S. a fixed number of Volkswagen brand vehicles from its German parent, and it distributes those vehicles to its approximately 600 dealers nationwide, including to its 17 dealers in Virginia. (Ct. App. App. at 393.)[2]

Miller Auto Sales, Inc. ("Miller") is a Volkswagen dealer located in Winchester, Virginia. Prior to 1998, Miller was a poor performing Volkswagen dealer, both with respect to its sales of new Volkswagen vehicles and its treatment of Volkswagen customers. During the entire year 1997, for instance, Miller sold a total of only 47 new Volkswagen vehicles, and its percentage of VWoA's nationwide sales was less than 0.035 percent. Miller also had some of the lowest scores in the nation on VWoA's customer satisfaction index. (Ct. App. App. at 442-43.)

The Commissioner of the Department of Motor Vehicles of the Commonwealth of Virginia (the

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[1] At the time of the commencement of the proceedings below, VWoA had its headquarters in Auburn Hills, Michigan. VWoA relocated its headquarters to Herndon, Virginia in April 2008.

[2] Citations to the Appendix from the proceedings before the Court of Appeals of Virginia are cited as "Ct. App. App."

"Commissioner") is the person responsible for the enforcement of the Commonwealth's motor vehicle statutes. On August 1, 2005, the Commissioner issued a hearing decision in an administrative proceeding involving VWoA and Miller. That decision provides the ultimate basis for Miller's current Petition for Writ of Certiorari (the "Petition"). The Commissioner was a party with respect to each level of appellate review that occurred below. Despite Miller's failure to name the Commissioner as a party in the caption of its Petition, the Commissioner should be a party with respect to any proceedings that occur before this Court.

II. THE STATUTE.

The relationship between VWoA and Miller is one that is regulated by Virginia statute. The Commonwealth of Virginia has adopted a comprehensive regulatory statute, known as the Virginia Motor Vehicle Dealer Franchise Act (the "Act"), Va. Code §§ 46.2-1500 *et seq.*, that regulates and governs the relationship, within Virginia, between motor vehicle manufacturers and distributors, on the one hand, and their dealers, on the other hand.[3] The Act is administered by the Commissioner.

[3] The Act regulates both motor vehicle manufacturers (companies that manufacture vehicles and ship them to dealers) and motor vehicle distributors (companies that purchase, and often import, vehicles manufactured by third parties and then ship them to dealers). For purposes of the issues raised in

(Continued on following page)

The Act contains a particular statutory provision – Va. Code § 46.2-1569(7) – that provides the basis for Miller's Petition. That statutory provision purports to dictate the number of new motor vehicles that a motor vehicle distributor must ship each month to each of its dealers in the Commonwealth. It states, in pertinent part, as follows:

> [I]t shall be unlawful for any [distributor] . . . [t]o fail to ship monthly to any dealer, if ordered by the dealer, the number of new vehicles of each make, series, and model needed by the dealer to receive a percentage of total new vehicle sales of each make, series, and model equitably related to the total new vehicle production or importation currently being achieved nationally by each make, series, and model covered under the franchise.

III. FACTUAL AND PROCEDURAL HISTORY.

In late 1997 and 1998, VWoA introduced a number of new vehicle models, including a facelifted Passat and the New Beetle.[4] When VWoA first introduced these vehicles, they were in short supply, and

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Miller's Petition, the Act treats manufacturers and distributors identically. Accordingly, in this brief, VWoA collectively refers to such entities as "distributors."

[4] VWoA shipped the first Passats to its dealers in September 1997. VWoA shipped the first New Beetles to its dealers in February 1998.

VWoA did not have enough vehicles available to satisfy all consumer demand. Accordingly, VWoA adopted a vehicle allocation system that determined how it would allocate the short-supply vehicles among its U.S. dealers.

In February 1998, shortly after VWoA's first shipments of the Passat, but before VWoA's first shipments of the New Beetle, Miller sent a letter to VWoA, with a copy to the Commissioner, complaining that VWoA's *allocation system* allegedly violated Va. Code § 46.2-1569(7). (Ct. App. App. at 82-83.) On the basis of this February 1998 complaint letter, the Commissioner appointed a hearing officer to conduct a formal evidentiary hearing regarding VWoA's *allocation system*, with Miller acting as the prosecuting officer. At the conclusion of the hearing, the Commissioner issued a hearing decision. In that decision, the Commissioner determined that, during late 1997 and early 1998, VWoA had violated Va. Code § 46.2-1569(7) because it had operated an *allocation system* that was not "equitable" under the statute. (Ct. App. App. at 232.)

VWoA appealed the Commissioner's hearing decision. On appeal, the Supreme Court of Virginia set aside the decision. *Volkswagen of America, Inc. v. Smit*, 266 Va. 444 (2003) (hereinafter, *Smit I*). The Court held that the Commissioner had exceeded his statutory authority in finding that Va. Code § 46.2-1569(7) regulated VWoA's *allocation system*. *Id.* at 453-54. The Court held that the statute, by its plain language, regulates the actual number of *vehicles*

shipped by a motor vehicle distributor, *not* the vehicle *allocation system* used by the distributor to make its shipment decisions. *Id.* The Court remanded the matter for further proceedings. *Id.* at 454.

On remand, the Commissioner appointed another hearing officer to conduct a second formal evidentiary hearing. At the hearing, Miller put on evidence that compared, for certain months during 1997 and 1998, the number of vehicles that VWoA shipped to it with the number of vehicles that VWoA imported nationwide. Specifically, Miller showed that, during the period October 1997 through April 1998, there were certain months during which VWoA shipped zero Passats or zero New Beetles to Miller, even though during those same months VWoA imported more Passats or New Beetles into the U.S. nationwide than VWoA had dealers nationwide. (Ct. App. App. at 475.) This evidence was summarized in an exhibit captioned "Shipments Not Equitably Related to Importations." (*Id.*) In putting on its case, Miller at no time presented any evidence relating to "equity," but instead simply put on a case based upon "basic mathematics."

VWoA, on the other hand, put on evidence intended to address the concept of "equity" embedded in Va. Code § 46.2-1569(7). (Ct. App. App. at 476-90.) VWoA proffered evidence that showed that, for the period relevant to the introduction of each new VWoA model, Miller's relative supply was significantly above the national average: for the New Beetle, it was nearly 5% higher; for the Passat, it was 85% higher;

for the Jetta, it was 19% higher; for the Golf, it was 188% higher; and for the Cabrio, it was 33% higher. (*Id.*) VWoA also offered evidence that showed that, for each month in which VWoA shipped zero Passats or New Beetles to Miller, equitable considerations beyond "basic mathematics" made such shipments "equitable." Among other things, VWoA put on evidence that showed that it did not ship Passats to Miller during the period October 1997 through April 1998 because Miller had refused to acquire certain basic equipment necessary to repair the vehicle, equipment that almost every other dealer in the U.S. had purchased. (*Id.* at 319-20.)

At the conclusion of the hearing, the Commissioner issued a second hearing decision. In that decision, the Commissioner found that between October 1997 and April 1998 VWoA had violated the Statute because, during those months, VWoA did not ship any Passats or New Beetles to Miller, despite the fact that, during those same months, VWoA had imported more of those vehicles nationwide than it had dealers nationwide. The Commissioner found that, regardless of any other equitable factor, in the context of a distributor's launch of a new model vehicle, Va. Code § 46.2-1569(7) prohibits a distributor from shipping zero vehicles to a dealer during any month if, during that same month, the distributor has imported more vehicles nationwide than it has dealers nationwide. Specifically, the Commissioner determined:

> By using basic mathematics to analyze whether an allocation of zero vehicles would

> satisfy the statutory requirement that a [distributor] ship to a dealer the number of new vehicles of each make, series, and model needed by the dealer to receive a percentage of total new vehicle sales of each make, series, and model equitably related to the total new vehicle . . . importation currently being achieved nationally by each make, series, and model covered under the franchise, I find that such an allocation would generally not satisfy the statutory requirement in months where, as in this case, the national importation numbers exceed the number of dealers nationally, and particularly where, as in this case, the vehicles are newly introduced makes, series or models. An allocation of zero vehicles, assuming a dealer has no such vehicles in inventory, translates to zero sales and zero sales, expressed as a percentage of new vehicle sales, would be zero percent. It is my opinion that shipping a number of vehicles that will enable a dealer to achieve or receive zero percent of the sales of a vehicle is generally not equitably related to national importation. I would note that I am limiting this finding, that a shipment of zero vehicles will not allow a dealer to achieve a parentage of vehicle sales equitably related to national importations, to *newly introduced* makes, series and models of vehicles, such as the Passats and New Beetles in this case, where no meaningful history of dealer or national sales exist for the new vehicle.

(Ct. App. App. at 45, emphasis in original.)

VWoA appealed the Commissioner's second hearing decision. After thorough briefing and extended oral argument, the Supreme Court of Virginia issued a decision setting aside the decision. *Volkswagen of America, Inc. v. Smit*, 279 Va. 327 (2010) (hereafter, *Smit II*). In its decision, the Court held that Va. Code § 46.2-1569(7) was unconstitutionally vague as applied by the Commissioner with respect to VWoA's shipment of vehicles to Miller. *Id.* at 342.

In its decision, the Supreme Court of Virginia conducted a thorough constitutional analysis. The Court began its analysis by setting forth the relevant constitutional standard:

> [T]here are two, independent ways in which a statute can be impermissibly vague. "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement."

Id. at 337. The Court then analyzed Va. Code § 46.2-1569(7) under the first prong of this standard. *Id.* at 338-39.

Based upon its analysis, the Supreme Court of Virginia concluded that "as applied by the Commissioner . . . [,] Code §46.2-1569(7) . . . is impermissibly vague." *Id.* at 339. The Court determined that, with respect to a newly launched vehicle, neither Va. Code § 46.2-1569(7) nor any administrative regulation or guidance issued by the Commissioner provided VWoA with notice that Va. Code § 46.2-1569(7) requires –

based solely upon basic mathematics and without regard to any other equitable factor – a distributor to ship at least one vehicle per month to each of its Virginia dealers so long as the distributor is importing nationwide more vehicles than the distributor has dealers nationwide. Specifically, the Court concluded:

> Neither the statute nor any administrative regulation or guidance promulgated by the Commissioner provided [VWoA] with notice that if the number of vehicles available in a given month was equal to or greater than the number of dealers making requests, it was prohibited from failing to deliver to [Miller] at least one of each model of vehicle requested without regard to any other factors that might impact the determination of the number of vehicles the dealer would otherwise be entitled to receive.

Id. Based upon this determination, the Court ordered that the Commissioner's second hearing decision be set aside and that final judgment be entered in favor of VWoA. *Id.* at 342.[5]

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[5] Because the Virginia Supreme Court was able to decide the case by holding that Va. Code § 46.2-1569(7) was impermissibly vague as applied by the Commissioner under the specific facts of this case, it did not reach and made no determination as to the other arguments made by VWoA: (i) that Va. Code § 46.2-1569(7) is unconstitutionally vague on its face, and (ii) that it violates the dormant Commerce Clause of the U.S. Constitution. *Id.*

SUMMARY OF THE ARGUMENT

Miller asks this Court to grant a writ of certiorari with respect to the decision rendered by the Supreme Court of Virginia. Miller argues that this case is worthy of review because the Court committed a "wrong of constitutional dimension." Miller contends that a decision by this Court would provide guidance to the state and federal courts regarding the proper judicial test for statutory vagueness under the Due Process Clause of the U.S. Constitution. This Court should deny Miller's Petition.

First, Miller fails to present any "compelling reason" for this Court to accept this case. Even a cursory review of the Supreme Court of Virginia's decision shows that the Court correctly stated all relevant constitutional principles. Indeed, Miller's Petition itself actually cites the same constitutional principles and references the same supporting decisions from this Court as does the decision of the Supreme Court of Virginia. Miller's argument is only that the Court somehow incorrectly *applied* the constitutional principles that it correctly stated. This Court should not grant a writ of certiorari to resolve such an "as applied" challenge. Any decision by this Court would have relevance only to the parties in this particular case.

Second, each of Miller's substantive arguments is based upon a misstatement by Miller as to the actual analysis applied by the Supreme Court of Virginia. This Court should not grant a writ of certiorari where

the sole contentions of legal error are based upon incorrect statements by the petitioner as to the contents of the decision below.

ARGUMENT

I. THIS COURT SHOULD DENY MILLER'S PETITION BECAUSE THE CASE PRESENTS NO ISSUE WORTHY OF THIS COURT'S ATTENTION.

A. The Standard For Granting A Writ Of Certiorari.

Supreme Court Rule 10 states that "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion." The rule makes clear that "[a] petition for a writ of certiorari will be granted only for compelling reasons." According to the rule, a "compelling reason" exists where "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort" or "a state court . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court." (Supreme Court Rule 10.) In addition, a compelling reason exists "only in cases involving principles the settlement of which [would be] of importance to the public as distinguished from the parties." *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951).

B. There Is No Compelling Reason For This Court To Grant A Writ Of Certiorari.

1. The Supreme Court Of Virginia Correctly Articulated All Relevant Constitutional Standards.

Miller argues that the Supreme Court of Virginia "disregarded and contradicted this Court's Due Process jurisprudence" and that "[t]his case [thus] presents a wrong 'of constitutional dimension' appropriate for resolution by this Court." (Pet. 14, *citing Smith v. Philips*, 455 U.S. 209, 221 (1982).) Contrary to Miller's assertions, in its decision below, the Court did not disregard or contradict any established principle of constitutional law. This case thus does not present any "wrong of constitutional dimension."

In its decision, the Supreme Court of Virginia did not decide any constitutional issue in any manner inconsistent with the holding of any other state court of last resort. The Court also did not ignore any constitutional principle articulated by this Court. Instead, the Court correctly stated each constitutional principle relevant to this case, and, in doing so, cited and directly followed established precedents of this Court. Indeed, despite Miller's rhetoric in the section of its Petition entitled "Reasons for Granting the Petition," Miller itself actually fails to point to any actual incorrect statement of constitutional law by the Court. In fact, throughout its Petition, Miller itself repeats the same constitutional principles and

cites the same cases as are found in the decision below.

The first such relevant principle of constitutional law is the standard for judicial review of a state statute alleged to be unconstitutionally vague. The Supreme Court of Virginia explained the applicable constitutional standard as follows:

> [T]here are two, independent ways in which a statute can be impermissibly vague. "First, if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits. Second, if it authorizes or even encourages arbitrary and discriminatory enforcement."

Smit II, 279 Va. at 337, *quoting Hill v. Colorado*, 530 U.S. 703, 732 (2000). This statement of the standard was correct and fully consistent with this Court's established Due Process jurisprudence. In fact, in its Petition, Miller echoes the same standard and quotes the same case. (Pet. 15.)

The second relevant principle of constitutional law is the standard for conducting an "as applied" review of the state statute alleged to be unconstitutionally vague. The Supreme Court of Virginia explained that such a review must take place "in light of the facts at hand." The Court specifically stated: "[V]agueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as applied basis." *Smit II*, 279 Va. at 336, *citing*

Maynard v. Cartwright, 486 U.S. 356, 361 (1988). The Court's statement of the standard once again was correct. The standard follows directly this Court's holding in *Maynard*. It also follows directly from this Court's holding in *Hoffman*, 455 U.S. at 495, where this Court held that "a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others" and that "[a] court should. . . . examine the complainant's conduct before analyzing other hypothetical applications of the law." Once again, in its Petition, Miller repeats the same standard and quotes the same case. (Pet. 15.)

Miller's Petition, therefore, does not involve any claim that the Supreme Court of Virginia incorrectly stated any principle of constitutional law. Miller's contention ultimately is only the following: that the Court allegedly *applied* incorrectly the constitutional principles that it correctly stated.

This Court should not accept review of a case in which the sole issue is whether the court below misapplied properly-stated principles of constitutional law. It has been this Court's long-standing practice to grant certiorari only when the decision below involves a question of *law*, rather than merely an alleged factual error or an alleged misapplication of a properly stated rule of law. Indeed, Supreme Court Rule 10 states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

Numerous decisions of this Court have adopted this approach. *See NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) ("[W]e are presented primarily with a question of fact, which does not merit Court review."); *United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); *Houston Oil Co. v. Goodrich*, 245 U.S. 440, 441 (1918) (dismissing writ of certiorari as improvidently granted because review "depended essentially upon an appreciation of the evidence."). Accordingly, because, at best, Miller raises nothing more than a complaint about how the Supreme Court of Virginia applied certain correctly-articulated principles of constitutional law, there is no compelling reason for this Court to exercise its discretion to grant the Petition.

2. A Decision By This Court Would Have Limited, If Any, Precedential Value.

Miller contends that this case has precedential value because it presents "an opportunity for this Court to clarify for federal and state courts the proper judicial test for statutory vagueness under the Due Process Clause of the Constitution." (Pet. 14.) Contrary to Miller's assertions, a decision by this Court would not provide significant guidance for federal and state courts. Instead, a decision by this Court would have little value, if any, to any person or

entity other than to those who are the parties to this case.

In its decision below, the Supreme Court of Virginia conducted a fact-specific, as applied analysis to a commercial statute, and held that, under the particular facts of this case, the statute was impermissibly vague as applied. *Smit II*, 279 Va. at 342 ("we hold that Code § 46.2-1569(7) is impermissibly vague *as applied in this case*, and the Commissioner's finding that Volkswagen was in violation of that statute must be set aside") (emphasis added). As noted above, the Court did not purport to overrule any precedent of this Court or to express any disagreement whatsoever with any such precedent. All of the relevant and well-settled constitutional principles of this Court (and analogous precedent under the parallel due process provisions of the Virginia Constitution) were duly cited and discussed at great length. Hence, any decision by this Court – regardless of the outcome – would accomplish nothing beyond indulging the parties in the relatively insignificant act of either agreeing or disagreeing with how the Court below applied the relevant constitutional standards to their particular case.

It is well settled that certiorari should be denied where the Court's decision would have "limited precedential value." *See, e.g., Illinois v. Fisher*, 540 U.S. 544 (2004) (Stevens, J., concurring). This Court "must necessarily confine itself to those [cases] that reflect the more important legal problems," for example, cases where "many individuals are involved or are

affected by the decision below." Robert L. Stern, et al., *Supreme Court Practice*, § 4.11, 13 (8th Ed. 2002) (*citing Patterson v. Lamb*, 329 U.S. 539 (1947)). Because the question of whether the Court below correctly applied properly-articulated constitutional principles to this particular case has "few if any ramifications beyond the instant case," it "does not satisfy any of the criteria for the exercise of this Court's discretionary jurisdiction." *Bartlett v. Stephenson*, 535 U.S. 1301 (2002). The "as applied" nature of the decision below imbues it with limited, if any, precedential value, and, accordingly, there is no compelling reason for this Court to exercise its discretion to grant a writ of certiorari.

II. THIS COURT SHOULD DENY MILLER'S PETITION BECAUSE EACH OF MILLER'S SUBSTANTIVE ARGUMENTS IS BASED UPON A MISSTATEMENT BY MILLER OF THE SUPREME COURT OF VIRGINIA'S DECISION.

A. Contrary To Miller's Contention, In Conducting Its "As Applied" Analysis, The Supreme Court Of Virginia Did Not Evaluate The Statute Based Upon A Hypothetical.

Miller's first substantive argument as to why this Court should grant its Petition is that the Virginia Supreme Court, in conducting its Due Process review, did not conduct a proper "as applied" constitutional analysis. Miller contends that, in addressing whether

VWoA had fair warning that its conduct was proscribed by Va. Code § 46.2-1569(7), the Court failed to consider VWoA's "actual conduct," but instead considered a "hypothetical scenario" that the Court itself concocted. (Pet. 14.) Specifically, Miller contends that the Court ignored VWoA's actual conduct, and instead constructed a hypothetical, when it framed the constitutional question before it as "whether [Va. Code § 46.2-1569(7)] gave notice to [VWoA] that it was prohibited from failing to ship at least one vehicle of each model to [Miller] 'if it were otherwise capable of doing so' or 'without regard to any other factors.'" (Pet. 18-19.) Thus, according to Miller, "[a]lthough the Supreme Court of Virginia purported to conduct an as applied analysis, it actually failed to do so because it did not examine the statute 'in light of the facts of the case at hand.'" (Pet. 17.)[6]

Miller's argument is based upon a misstatement of the analysis engaged in by the Supreme Court of Virginia. Contrary to Miller's contention, the Court did not consider "hypothetical" facts. The facts that Miller contends are "hypothetical" are the "actual" facts of the case.

[6] In essence, Miller contends that the Virginia Supreme Court, despite purporting to conduct an "as applied" analysis, effectively applied a "facial" analysis.

The facts of this case are as follows:

- That during 1997, VWoA launched the Passat.
- That during those months between October 1997 and April 1998, VWoA shipped zero Passats to Miller.
- That during those same months, VWoA imported more Passats nationwide than the number of dealers that it had nationwide.
- That during 1998, VWoA launched the New Beetle.
- That during those months between February 1998 and April 1998, VWoA shipped zero New Beetles to Miller.
- That during those same months, VWoA imported more New Beetles nationwide than the number of dealers that it had nationwide.

Smit II, 279 Va. at 333-34. The Supreme Court of Virginia conducted its "as applied" analysis in light of these facts.

During the proceedings below, the Commissioner found that Va. Code § 46.2-1569(7) prohibits a distributor – based solely upon "basic mathematics" and without regard to any other equitable factor – from shipping zero of a newly-introduced model of vehicle to a Virginia dealer during a given month if, during that same month, the distributor imports

more of the vehicle nationally than the distributor has dealers nationally. On appeal, the Supreme Court of Virginia asked the following question: prior to VWoA's shipment of zero Passats and zero New Beetles to Miller during months in which VWoA was importing more of these vehicles nationwide than it had U.S. dealers nationwide (the actual facts of this case), did VWoA have fair warning that shipping zero vehicles under such circumstances would violate Va. Code § 46.2-1569(7) as a matter of "basic mathematics" and without consideration of any other equitable factor. The Court held that VWoA did not have such fair warning:

> Neither the statute nor any administrative regulation or guidance promulgated by the Commissioner provided [VWoA] with notice that if the number of vehicles available in a given month was equal to or greater than the number of dealers making requests, it was prohibited from failing to deliver to [Miller] at least one of each model of vehicle requested without regard to any other factors that might impact the determination of the number of vehicles the dealer would otherwise be entitled to receive.

Smit II, 279 Va. at 339.

Miller's argument, therefore, that the Supreme Court of Virginia decided this case based upon a "hypothetical" is a misstatement of the analysis that the Court undertook. The "hypothetical" facts that Miller contends were applied by the Court are, in fact, the "actual" facts of the case. To the extent that

Miller is contending that there somehow is a distinction between shipping "zero vehicles" (the phrase used by the Commissioner) and failing to ship "one vehicle" (the phrase used by the Court), the distinction is nothing more than a semantic one without substantive meaning.

B. Contrary To Miller's Contention, In Conducting Its "As Applied" Analysis, The Supreme Court Of Virginia Did Not Ignore The Principle That A "Plaintiff Who Engages In Some Conduct That Is Clearly Proscribed Cannot Complain Of The Vagueness Of The Law As Applied To The Conduct Of Others."

Miller's next, but related, substantive argument is that the Supreme Court of Virginia did not conduct a proper "as applied" constitutional analysis because it disregarded *Hoffman* and its holding that a "plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." (Pet. 21.) In making this argument, Miller once again misstates the decision below.

In the first place, the Virginia Supreme Court clearly did not ignore *Hoffman*. The decision itself actually cites *Hoffman*. *Smit II*, 279 Va. at 337.

In the second place, the Court did not ignore the principle expressed in *Hoffman*." In its decision, the

Court specifically analyzed whether VWoA's conduct was clearly proscribed by Va. Code § 46.2-1569(7), as applied by the Commissioner, and the Court concluded that such conduct was not clearly proscribed:

> Neither the statute nor any administrative regulation or guidance promulgated by the Commissioner provided [VWoA] with notice that if the number of vehicles available in a given month was equal to or greater than the number of dealers making requests, it was prohibited from failing to deliver to [Miller] at least one of each model of vehicle requested without regard to any other factors that might impact the determination of the number of vehicles the dealer would otherwise be entitled to receive.

Id. at 337. Thus, the Court did not ignore the principle expressed in *Hoffman*. Instead, it simply determined that Va. Code § 46.2-1569(7) did not clearly proscribe VWoA's conduct.

C. Contrary To Miller's Contention, In Conducting Its "As Applied" Analysis, The Supreme Court Of Virginia Did Not Improperly Rely Upon Cases Setting Forth The Non-Delegation Doctrine.

Miller's final substantive argument is that the Supreme Court of Virginia, in conducting its "as applied" analysis, improperly relied upon cases setting forth the non-delegation doctrine, which is a doctrine that arises under Article I of the Virginia

and U.S. Constitutions, rather than under the Due Process Clauses of those Constitutions. (Pet. 22-25.) Miller argues that, by commingling non-delegation doctrine principles with due process vagueness principles, the Court created a "hybrid" test for analyzing the constitutionality of Va. Code § 46.2-1569(7).

Miller's argument, once again, is based upon a misstatement of the analysis that the Supreme Court of Virginia actually performed. In conducting its "as applied" analysis, the Court determined that the interpretation of Va. Code § 46.2-1569(7) that was applied by the Commissioner during the administrative proceeding below – the interpretation that adopted "basic mathematics" as the statutory standard for determining the number of vehicles that a distributor must ship to each of its Virginia dealers during a new vehicle launch – was the result of the Commissioner's "arbitrary exercise of discretion." *Smit II*, 279 Va. at 341.

In conducting its analysis, the Court discussed the constitutional problems that exist with statutes that allow administrative officials to exercise standardless and unfettered discretion. In doing so, the Court discussed the second prong of the constitutional due process vagueness test for determining the validity of a challenged statute: whether the statute "authorizes or even encourages arbitrary and discriminatory enforcement." The Court also discussed certain of its prior cases implementing the

non-delegation doctrine, which also address the hazards of unfettered administrative discretion.[4]

Despite the discussion by the Supreme Court of Virginia about the constitutional infirmities of unbridled administrative discretion, a careful review of the Court's decision reveals that the Court did not invalidate Va. Code § 46.2-1569(7) on the basis of either the second prong of the due process vagueness test or the non-delegation caselaw that it cited. Instead, the Court struck down Va. Code § 46.2-1569(7), as applied by the Commissioner, solely on the grounds of the first prong of the constitutional due process vagueness test: that VWoA was not given fair notice of what the statute, as interpreted by the Commissioner, required.

Miller's argument thus once again is based upon a misstatement by Miller of the decision of the Supreme Court of Virginia. The Court did not apply a "hybrid" analysis that improperly comingled the due process vagueness doctrine and the non-delegation doctrine, as Miller erroneously contends.

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[4] The Court cited *City of Waynesboro v. Keiser*, 213 Va. 229 (1972), and *Chapel v. Commonwealth of Virginia*, 197 Va. 406 (1955).

CONCLUSION

There is no compelling reason for this Court to grant Miller's Petition or to issue a writ of certiorari. The Supreme Court of Virginia correctly articulated all relevant constitutional standards involved in this case, and any disagreement by Miller with respect to how the Court applied those correctly-stated standards does not merit this Court's attention. In addition, each of Miller's substantive arguments is based upon a misstatement by Miller as to the actual analysis contained in the Supreme Court of Virginia's decision. For these reasons, VWoA respectfully requests that this Court deny Miller's Petition for Writ of Certiorari.

Respectfully submitted,

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